NO. 45950-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MARTIN MICHAELSON,

Respondent,

v.

STATE OF WASHINGTON
DEPARTMENT OF EMPLOYMENT
SECURITY,

Appellant.

APPELLANT'S RESPONSE BRIEF

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I. INTRODUCTION

This is a judicial review of the Employment Security Department Commissioner's decision denying Martin Michaelson unemployment benefits. Michaelson, a delivery truck driver, was discharged after he had three preventable collisions within twelve months while driving his employer's truck.

The Commissioner correctly concluded Michaelson's conduct was disqualifying misconduct because it amounted to carelessness or negligence of such a degree or recurrence as to show a substantial disregard of his employer's interest. The Pierce County Superior Court erroneously reversed the Commissioner's decision. The Commissioner's decision is supported by substantial evidence and is consistent with the statutory language and established precedent. The Department asks the Court to reverse the superior court and affirm the Commissioner's decision denying Michaelson unemployment benefits.

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II. ASSIGNMENTS OF ERROR[1]

1. The superior court erred in reversing the Commissioner's decision that denied Michaelson unemployment benefits.

2. The superior court erred in concluding that Michaelson's conduct was insufficient to demonstrate a substantial disregard of his employer's interest.

3. Because the superior court erred in reversing the Commissioner's decision, the superior court erred in awarding attorney fees and costs to Michaelson.

III. STATEMENT OF THE ISSUES

1. Michaelson has failed to specifically assign error to any of the Commissioner's findings of fact. Are the Commissioner's findings of fact verities on appeal? Even if Michaelson properly assigned error to the factual findings, does substantial evidence in the record support the Department's findings?

2. Under RCW 50.04.294(1)(d), a claimant is disqualified from receiving unemployment benefits if his conduct amounts to "carelessness or negligence of such degree or recurrence to show intentional or substantial disregard of his employer's interest." Did the Commissioner correctly conclude that Michaelson committed misconduct under the Employment Security Act when Michaelson had three preventable collisions while driving his employer's truck and did not adequately follow his employer's procedures for ensuring vehicle safety, thereby substantially disregarding his employer's interests?

3. An unemployment benefits claimant is entitled to reasonable attorney fees and costs under RCW 50.32.160 only if the Commissioner's decision is modified or reversed. If this Court reverses the superior

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[1] Though the Department appeals the superior court's order reversing the Commissioner's decision, the party asserting the invalidity of the agency action—here, Michaelson—continues to bear the burden of showing invalidity in this Court. RCW 34.05.570(1)(a). And under this Court's General Order 2010-1, the party who appealed the agency's final order in superior court files the opening and reply briefs in this Court and, accordingly, must assign error to the Commissioner's findings and conclusions. The Department, therefore, only assigns error to the Pierce County Superior Court's order.

court and affirms the Commissioner's decision, should this Court also reverse the superior court's award of attorney fees and costs?

IV. COUNTERSTATEMENT OF THE CASE[2]

Michaelson worked as a delivery truck driver for Food Services of America (FSA). CP 21, 78 (FF 1).[3] He was terminated from FSA under their progressive discipline policy for having three preventable or "chargeable" collisions in a less than one year period. CP 23-26, 28-29, 63-64, 72-73, 79 (FF 4-8). A collision is considered preventable or "chargeable" if the employee is accountable for the collision. CP 24.

In Michaelson's first collision, he backed into a parked vehicle. CP 24, 25, 40-41, 69, 70, 79 (FF 2, 4). FSA determined Michaelson was at fault for this collision, and FSA therefore accepted liability for repairing the damage to the parked vehicle at a cost of over $1,000. CP 70, 71, 79 (FF 4). Under FSA's progressive discipline policy for a first incident, Michaelson received a written warning. CP 24, 69, 79 (FF 2, 4).

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[2] Michaelson's brief cites to the administrative record regardless of whether the point in the record is reflected in a finding of fact. *See* Opening Br. 5-6. But this Court's review is limited to determining whether the Commissioner's actual factual findings are supported by substantial evidence. RCW 34.05.570(3)(e). Therefore, the Department provides this statement of the case to present the facts as found by the Commissioner, which are the basis for this Court's review.

[3] The certified administrative record was transmitted by the Pierce County Superior Court Clerk and assigned Clerk's Papers numbers 3-103. The certified administrative record is cited herein using the page numbers assigned by the Superior Court Clerk. The number in parentheses represents either specific findings of fact (FF) or conclusions of law (CL) made by the administrative law judge and adopted by the Commissioner.

Three months later, Michaelson had a second collision. CP 24, 25, 69, 79 (FF 2, 5), 80 (CL 5). He was stopped at a red light and failed to continuously apply the truck brakes, causing his trailer to roll backwards into the vehicle behind him. *Id.* He was suspended for one day and placed on notice that a third collision would lead to termination. CP 24, 25, 69, 79 (FF 2, 5). Like the first collision, FSA determined Michaelson was at fault and accepted liability for repairing the damage to the stopped vehicle at a cost of over $1,300. CP 26, 71, 79 (FF 5).

In Michaelson's third collision, he was backing into a customer's loading dock and, without checking his surroundings, lowered his trailer too far and damaged its bumper. CP 24, 26-27, 69, 79 (FF 2, 6, 7). Michaelson was terminated after this collision. CP 26, 79 (FF 8). Since Michaelson did not always drive the same truck and trailer, he was responsible for conducting a daily inspection before driving in order to become familiar with the operation of all the equipment, including the suspension system for lowering the trailer. CP 41, 79 (FF 6).

FSA explained the progressive discipline system regarding collisions to Michaelson at the time of his hiring by providing him with training and an employee handbook.[4] CP 24, 74, 75, 79 (FF 2). This training included FSA's expectation that its drivers adhere to the Get Out

[4] Michaelson does not challenge the existence, his awareness, or the reasonableness of the company rules.

and Look (GOAL) safety method. CP 27-28, 79 (FF 4). Michaelson was reminded of this safety method after his first collision and of the "Safe Backing" safety method after his second collision. CP 70, 71, 79 (FF 4, 6).

At his hearing before the Office of Administrative Hearings (OAH), Michaelson admitted the three accidents had occurred. He stated:

> I take responsibility for causing the costing of the company for the property damage and the accident and do understand the accidents were harmful to the company . . . .

CP 34.

Michaelson filed a claim for unemployment benefits, which the Department denied, finding he had been discharged for disqualifying misconduct because of the "potential serious consequences and/or frequency of [his] preventable accidents." CP 58-62. Michaelson appealed this determination. CP 63-64.

After an administrative hearing, the Administrative Law Judge (ALJ) issued an Initial Order affirming the Department's initial determination. CP 78-82. The ALJ found each of the three accidents was preventable. CP 79 (FF 4-8). The ALJ's findings included that "Three accidents in a twelve month period led the employer to believe that the potential of further accident was greater, causing liability to the

employer." CP 79 (FF 2). Michaelson petitioned the Commissioner[5] for review of the Initial Order. CP 86-87. The Commissioner upheld the Initial Order and adopted the ALJ's findings and conclusions. CP 92-93. Michaelson appealed, and the Pierce County Superior Court reversed the Commissioner's Decision. CP 119-122. This appeal by the Department followed.

V. STANDARD OF REVIEW

Washington's Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of a final decision by the Department's Commissioner. RCW 34.05.510; RCW 50.32.120; *Rasmussen v. Dep't of Emp't Sec.*, 98 Wn.2d 846, 849, 658 P.2d 1240 (1983). Although this is an appeal from the superior court order reversing the Commissioner's decision, an appellate court "sits in the same position as the superior court" and reviews the Commissioner's decision, applying the APA standards "directly to the record before the agency." *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993); *Employees of Intalco Aluminum Corp. v. Emp't Sec. Dep't*, 128 Wn. App. 121, 126, 114 P.3d 675 (2005); RCW 34.05.558. This is of particular importance in this case

[5] The final agency determination is rendered by a review judge from the Commissioner's Review Office. For the sake of simplicity, the review judge is referred to throughout this brief as the Commissioner because the Commissioner of Employment Security has delegated his authority to make a final agency decision in these matters to the Commissioner's Review Office. *See* WAC 192-04-020(5).

because while the Department appeals the superior court's order, this Court reviews the Commissioner's decision.

In this appeal, the Commissioner's decision is prima facie correct, and it is Michaelson's burden to establish its invalidity. RCW 34.05.570(1)(a); *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). Michaelson must therefore show that the Commissioner's determination that he was discharged for misconduct was incorrect.

Findings of fact must be upheld if supported by substantial evidence. RCW 34.05.570(3)(e); *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Neither on appeal in the superior court, CP 9-26, nor before this Court, does Michaelson specifically challenge any of the Commissioner's findings of fact. Accordingly, they are verities on appeal. *Tapper*, 122 Wn.2d at 407.

Questions of law are reviewed under the error of law standard and are subject to de novo review. *See Shaw v. Emp't Sec. Dep't*, 46 Wn. App. 610, 731 P.2d 1121 (1987); *Ciskie v. Dep't of Emp't Sec.*, 35 Wn. App. 72, 74, 664 P.2d 1318 (1983). While review is de novo, courts have consistently accorded a heightened degree of deference to the Commissioner's interpretation of employment security law in view of the

Department's expertise in administering the law. *See Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984).

Whether an employee's actions constitute misconduct is a mixed question of law and fact. *Griffith v. Dep't of Emp't Sec.*, 163 Wn. App. 1, 9, 259 P.3d 1111 (2011). This Court must: (1) determine whether substantial evidence supports the Commissioner's factual findings, (2) make a de novo determination of the correct law, and (3) apply the law to the applicable facts. *Tapper*, 122 Wn.2d at 403.

Michaelson apparently claims, though he makes no specific argument, that the Department's decision was arbitrary and capricious. *See* Opening Br. 2-3. An agency's decision is arbitrary and capricious only if it is "willfully unreasonable, without consideration and in disregard of facts or circumstances." *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 450, 41 P.3d 510 (2002). "If the decision is the result of honest and due consideration, it is not arbitrary and capricious even if reasonable minds could disagree with the result." *Stephens v. Emp't Sec. Dep't*, 123 Wn. App. 894, 905, 98 P.3d 1284 (2004).

VI. ARGUMENT

Substantial evidence supports the Commissioner's findings that Michelson was involved in three collisions within one year that could have been prevented through compliance with the employer's safety methods.

Michaelson generally argues that two of the three collisions were not preventable, but he does not specifically assign error to any of the relevant findings. Opening Br. 4. Further, the Commissioner properly concluded Michaelson's conduct in having these collisions exhibited carelessness or negligence of such a degree as to show substantial disregard of his employer's interests. Michaelson was thus properly disqualified from unemployment benefits. Because the Commissioner's decision was correct, the superior court's award of attorney fees to Michaelson should be reversed.

A. Michaelson Does Not Challenge Any Of The Findings Of Fact And They Are Verities On Appeal, And In Any Event, The Findings Are Supported By Substantial Evidence

Michaelson does not specifically assign error to any of the Commissioner's finding of fact, including the findings that Michaelson had three preventable collisions within one year and that he was expected to follow the employer's safety procedures. CP 79 (FF 2-8, CL 4-5); *see* RAP 10.3(g) and (h); *In re Disciplinary Proceeding Against Petersen*, __ Wn.2d __, 329 P.3d 853, 858 (July 3, 2014) (The burden is on the party challenging the findings of fact to properly assign error and to establish that specific challenged findings are not supported by the record.). Because these findings are unchallenged, they are verities on appeal. *Tapper*, 122 Wn.2d at 407. Even if Michaelson's brief can be interpreted

as assigning error to the factual findings, substantial evidence supports the findings, and they should be upheld. *See* RCW 34.05.570(3)(e).

Substantial evidence is evidence "sufficient to persuade a rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987).

Here, substantial evidence supports the finding that all three of Michaelson's collisions were preventable. The employer's representative testified that preventable or "chargeable" means the driver is accountable for the collision. CP 24, 29. In the first collision, Michaelson backed into a parked vehicle. CP 79 (FF 4). It was Michaelson's responsibility to be aware of his surroundings and get out of his vehicle to ensure he was backing up safely. CP 27-28. The employer determined he failed to adequately comply with these safety procedures and took financial responsibility for repairing the other damaged vehicle. CP 25, 40-41. This supports the finding that the collision was preventable. That the vehicle was stationary when Michaelson hit it further supports Michaelson's unawareness of his surroundings and that the collision was preventable. CP 79 (FF 4). In the least, substantial evidence supports the finding.

Michaelson concedes that the second collision, where his trailer rolled backwards into a vehicle at a stoplight, was preventable. Opening Br. 7. In the third collision, Michaelson damaged his trailer's bumper when he lowered his trailer too far while at a customer's loading dock. CP cite, 79 (FF 7). Michaelson was accountable for this collision because, as the employer testified, he failed to properly determine how his equipment operated and failed to check his surrounding prior to lowering his trailer. CP 26-27. FSA expected its employees to be aware of their surroundings and get out of their truck and look before backing in to a location. CP 28, 79 (FF 4, 6; CL 4, 5, referencing employer's "GOAL" safety procedure when backing trucks). For example, FSA's representative testified that if an employee is operating in a new environment, the employee needs to "get out and observe above, below, behind and on either side..." CP 27. Michaelson was reminded of this expectation in the warning letter he received after his first collision. CP 70.

While Michaelson in his brief asserts his own version of the facts to argue that two of the collisions were not preventable, Opening Br. 11-12, this Court may not reweigh conflicting evidence when reviewing factual inferences made by the Commissioner before interpreting the law.[6]

[6] Michaelson's assertion that minor scraping of a bumper happens regularly and that others are not similarly disciplined for it is not supported by citation to authority and for that reason should be disregarded. Opening Br. at 8. Further, even if this assertion

Fred Hutchinson Cancer Research Ctr., 107 Wn.2d at 713. The Court is not free to substitute its judgment of the facts for that of the agency. *Tapper*, 122 Wn.2d at 403. The Commissioner here properly considered all the evidence, found FSA's testimony to be persuasive, and made findings based on that testimony. This Court should reject Michaelson's invitation to sit as the trier of fact and reweigh the evidence on appeal. Rather, this Court is limited to reviewing whether the Commissioner's findings are supported by substantial evidence.

Further, evidence submitted at the hearing demonstrates Michaelson knew about FSA's policies regarding progressive discipline and collisions. Michaelson acknowledged receiving the driver training guide, CP 74, and acknowledged he read and understood the company's policies. CP 75. FSA's representative also testified that employees receive training on progressive discipline and collisions when hired and when subject to discipline after a collision, as Michaelson was. CP 23-24.

Because Michaelson failed to properly assign error to the findings of fact, they are verities on appeal. But even if he had assigned error to the findings, adequate support exists in the record for the Department's findings and the Court should therefore uphold them.

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were true, it does not negate that Michaelson was "accountable" for the collision within the meaning of the employer policy.

B. Michaelson Is Disqualified From Unemployment Benefits Under The Statutory Definition of Misconduct And The Policy Underlying The Act

The Commissioner correctly applied the plain statutory language to the facts to conclude Michaelson committed disqualifying misconduct under the Employment Security Act. While it is Michaelson's burden to establish the Commissioner made a legal error, he cites no authority in his brief that establishes such error.

The purpose of the Act is to assist people who are "involuntarily" unemployed "through no fault of their own." RCW 50.01.010; *Tapper*, 122 Wn.2d at 408. For Michaelson to receive benefits, the Act requires that "the reason for [his] unemployment be external and apart from" him. *Cowles Publ'g Co. v. Dep't of Emp't Sec.*, 15 Wn. App. 590, 593, 550 P.2d 712, 715 (1976) ("Where any fault of unemployment lies with the claimant, the claimant is disqualified from receipt of unemployment benefits."). Accordingly, Michaelson is disqualified from receiving unemployment benefits if he was discharged for work-connected misconduct. RCW 50.20.066.

Subsection (1) of RCW 50.04.294 broadly defines misconduct. "Misconduct" includes, but is not limited to, "carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest." RCW 50.04.294(1)(d).

"Carelessness" and "negligence" mean failure to exercise the care that a reasonably prudent person usually exercises. WAC 192-150-205(3). Use of "or" in RCW 50.04.294(1)(d) is disjunctive. *Mount Spokane Skiing Corp. v. Spokane Cnty.*, 86 Wn. App. 165, 174, 936 P.2d 1148, *review denied*, 133 Wn.2d 1021, 948 P.2d 389 (1997) (holding that courts generally presume "or" is used in a statute disjunctively unless there is clear legislative intent to the contrary). Consequently, intentional action does not need to be proven here in order to satisfy the statutory definition of misconduct. Rather, it is statutory misconduct for an employee to act in substantial disregard of the employer's interest. *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (it is a well settled rule of statutory construction that a court give effect to all the words in a statute and render no portion of a statute meaningless or superfluous).

As set forth above, substantial evidence in the record demonstrates Michaelson knew about FSA's progressive discipline policy and established safety requirements and had twice in a three-month period been disciplined for collisions. Despite these prior collisions and the known risk of termination, Michaelson made a third preventable error when he lowered his truck's bumper past the trailer lock, bending the truck's bumper. CP 26-27, 69. A reasonably prudent person who had

previous collisions would have taken more care in his driving than Michaelson demonstrated in these three incidents.

Instead, Michaelson failed to pay adequate attention to his work and failed to use his employer's procedures, including GOAL, to prevent accidents, resulting in three preventable collisions. CP 27, 33, 80 (CL 4, 5). Michaelson was reminded of the GOAL safety method after his first collision and of the "Safe Backing" safety method after his second collision. CP 70, 71. Michaelson's conduct demonstrated a substantial disregard of the impact his poor driving would have on FSA's customers and safety records. RCW 50.04.294(1)(d). Further, he put others at risk through his bad driving. As FSA's representative testified, its concern over Michaelson's three accidents in less than a year:

> raised increased risks of causing accidents which can cause significant harm to themselves or somebody else . . . . We have big concerns with safety of the pedestrian and people around us. And that—this is why we have the policy in place—part of why we have the policy in place. We need people to operate our equipment safely.

CP 28-29. Michaelson further admitted his collisions were "harmful" to the company. CP 34.

Because Michaelson failed to exercise care as a reasonably prudent person would, thereby showing substantial disregard of his employer's

interest, the Commissioner properly concluded he was discharged for disqualifying misconduct pursuant to RCW 50.04.294(1)(d).

This application of the misconduct statute is consistent with case law. In *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 36, 226 P.3d 263 (2010), the court held that it was careless or negligent conduct under RCW 50.04.294(1)(d) for an employee to record members of the public without their knowledge and consent. Doing so disregarded the employer's interest because "such conduct, if known by the general public of Kitsap County, could certainly impact a citizen's willingness to discuss issues with a county employee, thereby adversely impacting the county's interest in serving its constituents, as well as exposing the county to litigation and liability." Like the employee in *Smith*, Michaelson's conduct exposed FSA to liability for the collisions and undermined its reputation for the safe operation of their equipment. CP 29.

In another case interpreting the statutory definition of misconduct, RCW 50.04.294, a legal assistant was discharged because she could not perform her job as required. *Markham Group, Inc., P.S. v. Emp't Sec. Dep't*, 148 Wn. App. 555, 200 P.3d 748 (2009). In affirming the Department's decision to allow benefits, the *Markham* court concluded the employee did not have the skills or ability to meet the employer's expectations. *Id.* at 563-564. In contrast here, Michaelson had worked at

FSA since 2003 and nothing in the record indicates he was simply unable to perform his job as expected. CP 21. Unlike the employee in *Markham*, Michaelson had the skill and ability to perform his job, but through his recurring carelessness or negligence that resulted in harm to the employer, he failed to do so. The Court should affirm.

C. The Court Should Deny Michaelson Attorney Fees And Costs

Michaelson is entitled to reasonable attorney fees and costs only if this Court ultimately modifies or reverses the Commissioner's decision. RCW 50.32.160. As shown above, this Court should reverse the superior court's decision and affirm the Commissioner's decision. Thus, this Court should also reverse the superior court's award of attorney fees and costs to Michaelson.

VII. CONCLUSION

The Commissioner correctly concluded that Michaelson was discharged for misconduct and thus disqualified from receiving unemployment benefits. The Department asks the Court to reverse the superior court's decision, including the attorney fees and cost award, and affirm the Commissioner's decision denying Michaelson's unemployment benefits.

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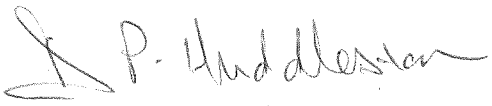
RESPECTFULLY SUBMITTED this 29th day of August, 2014.

ROBERT W. FERGUSON
Attorney General



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PROOF OF SERVICE

I, Judy St. John, declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 29TH day of August, 2014, I caused to be served a copy of **Appellant's Response Brief** on the Respondent's attorney of record on the below date as follows:

Via United States Postal Service, postage pre-paid and e-mail:

NIGEL S. MALDEN
711 COURT A, SUITE 114
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Original e-filed with
COURT OF APPEALS, II

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

Dated this 29TH day of August 2014 in Seattle, Washington

Judy St. John, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

August 29, 2014 - 12:16 PM

Transmittal Letter

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